



Fair Up or Down Vote

May 11, 2005

Noteworthy

“To this point, any suggested agreement by the other side involves a kind of random slaying of good people.” **Senator McConnell**, “Democrats Reject A Compromise On Judicial Nominees,” *The New York Times*, 5/11/05

“We need to turn to 100 United States Senators and move to the issue surrounding judges. And we have four on the executive calendar and again, the suggestion has been made let’s go straight to the executive calendar and deal with it one by one. And I think it is time to do that.” **Senator Frist**, Media Availability, 5/10/05

“They are putting partisan politics above the business of the country ... We have business to do here in the United States Senate, and we are going to continue to be the party of ideas. We have a full agenda. They have nothing.” **Senator Santorum**, “Frist, Reid To Lobby Business,” *Roll Call*, 5/11/05

[Democrats and the Filibuster, Washington Times, May 11, 2005](#)

Democrats and the Filibuster

Washington Times

May 11, 2005

This week marks the fourth anniversary of President Bush's first round of nominations to the increasingly powerful U.S. circuit courts of appeal. Coming from a newly elected president who proudly told voters in 2000 that conservative Supreme Court Justices Antonin Scalia and Clarence Thomas represented the kind of judges he would appoint if elected, that first batch of 11 appellate-court nominees included two black Democratic judges previously nominated by President Clinton. It was a magnanimous gesture that went unrequited by Democrats.

Democrats have made much of the fact that the Senate confirmed 204 federal judges during President Bush's first term, while "only" 10 judicial nominations were filibustered. However, it is not coincidental that 100 percent of the filibustered nominations were for the powerful circuit courts of appeal. Democrats also insist that filibustering appellate-

court nominations is just one tactic among several that the White House's opposition party may employ in the Senate. But it is also instructive that 100 percent of their filibustering occurred during the 108th Congress (2003-2004). Democrats never filibustered an appellate-court nomination during the 107th Congress (2001-2002). That is because, as the majority party throughout virtually all of the Senate's judicial-confirmation process, Democrats didn't need to filibuster. Instead, they could -- and did -- resort to "traditional" judicial-opposition tactics, which Republicans have also employed.

Thus, what can only be described as a concerted judicial-filibuster campaign during the 108th Congress was truly unprecedented. Indeed, throughout the entire history of the U.S. Senate, neither the minority-party members in that chamber nor senators of the party that did not occupy the White House had ever before engaged in such a coordinated, protracted filibustering campaign to frequently deny up-or-down votes for one judicial nominee after another. In fact, beyond the 10 appellate-court nominees who were actively filibustered in 2003 and 2004, it should further be noted that Democrats almost certainly would have filibustered additional circuit-court nominees -- including Terrence Boyle, Brett Kavanaugh and Thomas Griffith -- had they moved from the Judiciary Committee to the floor last year.

Democrats have cleverly -- and shrewdly -- perpetrated their unprecedented judicial obstructionism exclusively against nominees to circuit courts of appeal. Relatively speaking, these courts have become vastly more powerful in recent decades. With the Supreme Court issuing fewer and fewer decisions, the circuit courts have become the final arbiters more often than in the past. Unless reversed by the Supreme Court, a decision by an appellate court remains the final determination on both legal and constitutional grounds throughout its jurisdiction. In the case of the Ninth Circuit Court of Appeals, for example, that amounts to nine Western states, which comprise nearly 60 million people, or about 20 percent of the U.S. population. In addition, when the Supreme Court affirms an appellate court's decision, as it frequently does, the appellate justices will have played an integral role in the issue's final determination.

Appellate courts are extraordinarily important in another respect. Before arriving on the nation's highest court, seven of the nine current Supreme Court justices sharpened their judicial philosophies as circuit-court judges. Even the last four Supreme Court nominees who failed to win Senate confirmation -- Clement Haynsworth, G. Harold Carswell, Robert Bork and Douglas Ginsburg -- served on appellate courts. Thus, the appellate bench in recent decades has proved to be by far the single most important source of prospective Supreme Court nominees.

The Supreme Court grooming role played by appellate courts almost certainly explains why Democrats repeatedly -- no fewer than seven times -- voted to continue their filibuster against Miguel Estrada, prompting his eventual withdrawal. A 17-year-old immigrant from Honduras who later graduated Phi Beta Kappa from Columbia and magna cum laude from Harvard Law School, after which he served as a law clerk for Supreme Court Justice Anthony Kennedy and as an assistant to the solicitor general in the U.S. Department of Justice (1992-1997), Mr. Estrada would have been the first Hispanic on the D.C. Circuit Court of Appeals. That court is widely considered the most influential court below the Supreme Court, where Democrats feared Mr. Estrada would later again become the first Hispanic. That, simply, was a precedent Democrats could never tolerate.